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PRESIDING OFFICER'S
RULING NO. MC96-3/10

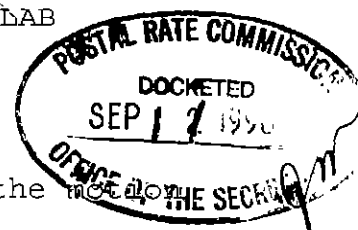
UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Special Services Fees and Classifications

Docket No. MC96-3

PRESIDING OFFICER'S RULING DISPOSING OF MOTIONS CONCERNING
INTERROGATORIES OF NASHUA PHOTO AND MYSTIC COLOR LAB

(September 11, 1996)



Order No. 1129, issued on August 8, 1996, granted the motion of Nashua Photo and Mystic Color Lab (Nashua/Mystic) to enlarge the scope of this proceeding to consider the desirability of establishing a separate fee category for bulk, non-automatable Business Reply Mail (BRM). Subsequently, Nashua/Mystic served three sets of interrogatories on the Postal Service.¹ On August 16, 1996, the Postal Service filed a motion to reconsider Order No. 1129, which enlarged the scope of this docket. Motion of the United States Postal Service for Reconsideration of PRC Order No. 1129 or, in the Alternative, for Severance of Consideration of the Nashua/Mystic Proposal in a Separate Proceeding. On August 19, and August 23, 1996, the Postal

¹ Nashua Photo Inc. and Mystic Color Lab First Interrogatories and Request for Production of Documents to United States Postal Service (NM/USPS 1-27), were served on August 8, 1996; Nashua Photo, Inc. and Mystic Color Lab Second Interrogatories and Request for Production of Documents to United States Postal Service (NM/USPS 28-36) were served on August 12, 1996; Nashua Photo Inc. and Mystic Color Lab Third Interrogatories and Request for Production of Documents to United States Postal Service (NM/USPS 37-65) were served on August 13, 1996.

Service filed motions for relief from its obligation to respond to interrogatories NM/USPS 8-27 and 37-65, respectively, pending resolution of its motion to reconsider Order No. 1129, and objections to selected interrogatories in these groups.²

Nashua/Mystic filed its motion to compel responses to its first and third set of interrogatories on August 29, 1996, as part of its opposition to the Postal Service's motion for reconsideration of Order No. 1129. Nashua Photo Inc. and Mystic Color Lab Opposition to United States Postal Service Motion to Reconsider and All Pending Discovery Motions, and Nashua/Mystic Motion to Compel ("Motion to Compel"). The Response of the United States Postal Service to Nashua/Mystic Motion to Compel was filed on September 5, 1996 ("Response to Motion to Compel").

On September 10, 1996, the Commission issued Order No. 1132, denying the Postal Service's motion to reconsider Order No. 1129. The Postal Service's motions for relief from its obligation to respond to various Nashua/Mystic interrogatories are denied as moot, as a result of the Commission's denial today of the Postal Service's motion to reconsider Order No. 1129. It is now appropriate to dispose of the Nashua/Mystic motion to compel in light of Order No. 1132. Compelled responses will be due ten days from the date of this ruling, as provided in Rule 25(d).

² Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS-8-27) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative, Objections to Nashua/Mystic Interrogatories ("Motion of August 19"); Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS-37-65) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative, Objections to Nashua/Mystic Interrogatories ("Motion of August 23").

Interrogatories NM/USPS 8, 9, 10, 20, 23, 24, 25 and 27.

In its Motion of August 19, the Postal Service asked to be relieved of its obligations to respond to these interrogatories pending disposition of its motion for reconsideration of Order No. 1129, but did not otherwise object to these interrogatories. Accordingly, the Motion to Compel will be granted as to these interrogatories.

Interrogatories NM/USPS-11 through 19.

In the Postal Service's August 19 motion, it objected to interrogatories NM/USPS-11 through 19 and NM/USPS-21 and 22 on the grounds that they refer to the BRM-related testimony by Postal Service witnesses in Docket No. R94-1 that was struck from the record. The Postal Service characterizes these interrogatories as seeking to "re-hash" assumptions, opinions, and observations about BRM that the Commission chose to exclude from that docket. Motion of August 19 at 3.

Nashua/Mystic points out that this is the most recent Postal Service testimony addressing its BRM program. It also observes that the reason that it was struck from the record had nothing to do with defects in its content, but was based upon the procedural inappropriateness of filing evidence to establish an affirmative case at the rebuttal stage of the hearing. Motion to Compel at 5. It also argues that the substance of the information sought by these interrogatories is valid discovery, and does not depend

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on the references made to the Docket No. R94-1 testimony, which serve only to provide a context for its substantive questions.

An examination of these interrogatories supports Nashua's arguments that the substance of the information sought is legitimate discovery. The Postal Service is directed to answer them as though they ask for institutional responses from the Postal Service, without reference to the Docket No. R94-1 testimony cited.

Although the Postal Service objected to NM/USPS 14(a), and (c) through (e) on the grounds that they did not appear to be relevant to the Nashua/Mystic proposal [Motion of August 19 at 4-5], Nashua plausibly argues that they are designed to obtain information about an analogous Postal Service product that might serve as a model for its proposal. Motion to Compel at 7. Accordingly, its motion to compel is granted as to these interrogatories.

Interrogatory NM/USPS-19(c) asks the Postal Service to explain "why the Postal Service and the DMM do not require a minimum volume of incoming BRM mail in order to qualify for the BRMAS rate." The Postal Service objects that this interrogatory appears to call for a legal conclusion about its authority to interpret DMCS language in the DMM. Motion of August 19 at 5; Response to Motion to Compel at 3-4. Nashua explains that it seeks to understand whether there is an operational, marketing or other reason for not requiring a minimum volume for BRMAS mail. Motion to Compel at 7-8. The Postal Service need only identify any substantive reasons it may have for not requiring a minimum volume to qualify for the BRMAS fee, and need not address any legal issue that it believes this interrogatory might touch upon.

Interrogatories NM/USPS-12 and 21.

The Postal Service also objects that NM/USPS 12 and 21, which ask about changes in the level of supervision and oversight of the BRMAS program, are not relevant to the Nashua/Mystic proposal. Motion of August 19 at 4; Postal Service Response to Compel at 2-3. Nashua does not explain why it considers these interrogatories relevant to its proposal. Accordingly, its motion to compel will be denied as to these interrogatories.

Interrogatories NM/USPS-22(b) and 26.

Interrogatory NM/USPS-22(b) asks the Postal Service to confirm that the BRM fees that mailers pay are based on the attributable costs of counting, rating, and billing BRM pieces. Interrogatory NM/USPS-26 asks if the Postal Service believes that the 10-cent BRM fee for "other" (non-prebarcoded) BRM pieces should be used to cover the attributable costs of pre-barcoded BRM pieces. The Postal Service appears to object that it will not have sufficient information to answer these questions until it completes its BRM study. Motion of August 19 at 6. These interrogatories ask what costs the BRM fee for "other" BRM pieces is *intended* to reflect. It would appear that this could be answered without a special operational survey or cost study. Accordingly, the Postal Service is directed to respond to these interrogatories.

Interrogatories NM/USPS-45, and 49(a) and (c)

Interrogatory NM/USPS-45 asks which sections of the Postal Reorganization Act, the DMCS, or the DMM govern the Prepaid Courtesy Reply Mail experiment that the Postal Service is conducting. The Postal Service considers this impermissible discovery because it "calls for the statement of a legal conclusion." Motion of August 23 at 2.

This question appears to ask for the Postal Service as an institution to state whether it takes a position that any statute or regulation governs its Prepaid Courtesy Reply experiment. While it may be impermissible discovery to ask a witness who is not an attorney to formulate a legal opinion about a particular topic within the scope of his testimony, it is not per se impermissible to ask the Postal Service, as an institution, to identify any statutory and regulatory provisions that it believes apply to a particular service that it offers. Any number of scenarios can be hypothesized where the answer to such a question would lead to the discovery of admissible evidence. For example, if the Postal Service were to identify a particular statutory provision or regulation that it believes governs Prepaid Courtesy Reply Mail, a permissible follow-up question might be whether a particular element of that service is shaped by perceived legal requirements imposed by that provision or regulation, rather than cost, operational, or market considerations. Accordingly, the Postal Service is directed to answer NM/USPS-45.

In its opposition to the Postal Service's motion for reconsideration, Nashua/Mystic explains that Interrogatory NM/USPS-49(a) does not seek any predecisional management opinions

or recommendations with respect to Prepaid Courtesy Reply Mail. Nashua Opposition at 10. So interpreted, this interrogatory is permissible discovery, and the Postal Service is directed to respond. Nashua Mystic explains that NM/USPS-49(c) is intended to ask at what organization level the Prepaid Courtesy Reply experiment was approved. Id. at 10. Given this explanation, the Postal Service has withdrawn its objection to this interrogatory. Postal Service Response to Compel at 4. The Postal Service is directed to answer this interrogatory, as well.

Interrogatory NM/USPS-53

NM/USPS-53 asks "[d]oes the Postal Service consider Prepaid Courtesy Reply Mail to be a "Special Service" similar to BRM? The Postal Service objects, contending that this question seeks a "statement of a conclusion about the legal status of 'Prepaid Courtesy Reply Mail' whether it is subject to the jurisdiction of the Commission, and, if so, whether it is a class (or subclass or rate category) of mail or a special postal service within the meaning of the Postal Reorganization Act." Postal Service Response to Compel at 4-5. Nashua contends that this question merely seeks to know if the Postal Service considers Prepaid Courtesy Reply Mail "to be a special service, similar to BRM and the other special services at issue in this docket." Nashua Opposition at 10-11.

Nashua apparently intends this interrogatory to ask the Postal Service's view as to whether Prepaid Courtesy Reply Mail has product characteristics similar to BRM and the other special services involved in this docket, rather than the Postal

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Service's view as to the legal status of Prepaid Courtesy Reply Mail. So interpreted, the Postal Service is directed to respond to this interrogatory.

Motions for extension of time to respond to respond to interrogatories NM/USPS-1-7.

On August 8, 1996, Nashua/Mystic directed its first set of interrogatories to the Postal Service. Responses were due on August 22, 1996. The Postal Service did not object to NM/USPS 1-7, but filed a motion for an extension of time until September 6, 1996, to respond to them. The grounds offered were the need for "juggling other non-Docket No. MC96-3 responsibilities and obligations." Motion of the United States Postal Service for Extension of Time to Respond to Interrogatories from Nashua/Mystic (NM/USPS-1-7), August 22, 1996, at 2. In its opposition to the Postal Service's motion for reconsideration, Nashua/Mystic objected to the request for an extension, complaining that 29 days was an excessive time to respond to only seven interrogatories. Motion to Compel at 9. On September 6, 1996, the Postal Service answered NM/USPS-7, but filed a motion for a second extension of time, until September 13, 1996, to respond to NM/USPS 1-6. This time, the grounds offered were the need to respond to Presiding Officer's Information Request No. 3. Motion of the United States Postal Service for Second Extension of Time to Respond to Interrogatories from Nashua/Mystic (NM/USPS-1-6).

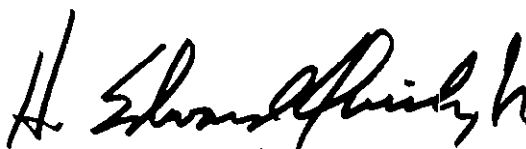
In addition, responses to NM/USPS-28-36 were due on August 26, 1996, but filed on August 30, 1996. The Postal Service included a motion for late acceptance on the ground that

certain postal managers were concentrating on the National Postal Forum. Motion of the United States Postal Service for Late Acceptance of Responses to Interrogatories of Nashua Photo, Inc. and Mystic Color Lab, August 30, 1996.

I will grant these motions for extensions of time, but warn the Postal Service that if motions for extension of time on the ground that staff is busy with other responsibilities become a persistent pattern, it will indicate an apparent indifference to the maintenance of the procedural schedule that has been tentatively adopted for processing its request in this docket.

RULING

1. The various motions pertaining to interrogatories NM/USPS 1-27 and 37-65 directed by Nashua Photo, Inc., and Mystic Color Labs to the Postal Service addressed in the body of the ruling are disposed of as described in this ruling.

A handwritten signature in black ink, appearing to read "H. Edward Quick, Jr.", is written over the printed name.

H. Edward Quick, Jr.
Presiding Officer